KOH HAN BOON

v.

IMPOWER SDN BHD & ANOR; RICHARD TSENG

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[CIVIL SUIT NO: S22-596-1997]
9 APRIL 2003

EVIDENCE: *Witness - Calling of witness by plaintiff - Breach of sale and purchase agreement - Whether production of witness relevant to issues in present case - Whether an expert witness - Whether statement adduced by witness admissible - Evidence Act 1950, ss. 45-54*

This dispute arose in relation to the 1st defendant's failure to settle the balance of the purchase price to the plaintiff regarding 25 pieces of land. The second defendant, as a stakeholder to the 1st defendant, had breached the sales and purchase agreement by allowing the transfer of the said properties to the 1st defendant despite the fact that the purchase price had not been settled in full. At the trial, counsel for the plaintiff sought to adduce a witness statement ('the said statement') affirmed by his second witness ('the proposed witness') on 8 April 2003 and stated his intention of calling her as a witness in connection to specific clauses in the sale and purchase agreement. The defendants and the third party objected to the proposed witness being called, contending *inter alia*, that she was not connected to the present dispute and that she did not qualify as an expert witness within the provisions of the Evidence Act 1950.

Held:

[1] The said statement essentially concerned her experience, her interpretation of the clauses in the sale and purchase agreement, her opinion of the documentary evidence before the court and her opinion relating to the issue of negligence. There was nothing to indicate that a nexus existed between the proposed witness to the transaction between the parties or to the agreement. Furthermore, it appeared that she was trying to interpret and construe the contractual terms and condition of the sale and purchase agreement which were matters to be decided by the courts. (pp 653 f-h & 654 a-c)

[2] The said statement related to a question of law, *ie*, interpretation and construction of legal agreements, and was therefore inadmissible. Therefore, it would not be necessary for the proposed witness to testify in court on those issues. (p 655 h)

[3] There was nothing to indicate the contents of the said statement could be admissible under the relevant provisions of the Evidence Act 1950. The opinion of the proposed witness in this case related to the interpretation and construction of documentary evidence and issues of negligence. (p 656 d-e)

[Witness disallowed from giving evidence; statement rendered inadmissible.]

Case(s) referred to:
Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386 HC ***(refd)***
Dato' Mokhtar Hashim v. PP [1983] 2 MLJ 232 ***(refd)***
Gleeson v. J Wippell & Co Ltd [1977] 1 WLR 510 ***(refd)***
Junaidi v. PP [1993] 4 CLJ 201 SC ***(refd)***
Kassim Sulong & Anor v. Guthrie Estates Holdings Ltd & Ors [1994] 3 CLJ 186 HC ***(refd)***
Pioneer Shipping Ltd & Ors v. BTP Tioxide Ltd [1982] AC 724 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 45, 46, 47, 48, 49, 50, 51, 52, 53, 54

Other source(s) referred to:
Sarkar's Law of Evidence, 15th edn, pp 871, 883

For the plaintiff - Robert Low (Ho Kok Yew); M/s Ranjit Ooi & Robert Low
For the 1st defendant & 3rd party - Liow Si Khoon (Grace Poh); M/s Liow & Co
For the 2nd defendant - Rodney Gomez (T Sagadevan); M/s Shearn Delamore & Co

Reported by M Maheswaran

JUDGMENT

Ramly Ali J:
The plaintiff's claim against the defendant is for a sum of RM3.6 million being the balance of a purchase price for the sale of 25 pieces of land (the properties). By two written sale and purchase agreements (SPA) both dated 5 June 1996, the plaintiff agreed to sell and the 1st defendant agreed to purchase the properties at a purchase price of RM4 million. Based on the terms of the SPA, the 1st defendant paid 10% of the purchase price amounting to RM400,000, immediately upon signing the agreements. It is an express term of the SPA that the balance purchase price amouting to RM3.6 million was to be paid by the 1st defendant to the 2nd defendant as stakeholder within three months from the date of consent from the relevant State Authority. The relevant State Authority consent had been obtained on or before 11 September 1996 and the balance purchase price was to be deposited with the 2nd defendant as stakeholder by 11 December 1996.

Also pursuant to the SPA, the 2nd defendant as stakeholder expressly undertook not to present the memorandum of transfer which was duly executed by the plaintiff in respect of the said properties until the balance purchase price of RM3.6 million was paid in full by the 1st defendant to the 2nd defendant. The plaintiff alleged that, in breach of the terms of the SPA the 2nd defendant presented the memorandum of transfer together with all the relevant documents for registration and subsequently transferred the said properties to the 1st defendant notwithstanding that the balance purchase price of RM3.6 million had yet to be paid by the 1st defendant. Plaintiff also alleged that, despite numerous reminders, the 1st defendant and the 2nd defendant has failed to pay the balance purchase price of RM3.6 million.

Additionally, the plaintiff's claim against the 2nd defendant is for breach of their duties as stakeholder in that they had failed to ensure that the balance purchase price had been paid into their account before proceeding to present for transfer the properties to the 1st defendant's name. The 2nd defendant, has successfully brought in a 3rd party to the present proceeding, who at the material time, was a managing director of the 1st defendant, claiming *inter alia*, that it was the 3rd party who informed the 2nd defendant that the purchase price had been fully settled and it was the 3rd party who instructed the 2nd defendant to affect the transfer.

The plaintiff started his case by calling the first witness (PW1) who is the plaintiff himself. After PW1 has given evidence, the plaintiff's counsel tendered a witness statement of the proposed 2nd witness, who is a practicing advocate and solicitor, intending to call her as the plaintiff's 2nd witness at the trial. The counsel for the 2nd defendant objected strongly to the proposed witness being called as well as her witness statement which she affirmed on 8 April 2003 being admitted, on the following grounds:

i) that the proposed witness is in no way connected with or involved in the relevant transaction;

ii) that her evidence or statements as appear in the witness statement clearly show that she was attempting to interpret and construe the contractual terms and conditions of the agreement or contract which is the subject matter of this action;

iii) that the construction of documents is a matter of law to which is a question solely to be decided by the court;

iv) that the proposed witness evidence (as contained in the witness statement) is purely a matter of opinion of a 3rd party who is in no way connected to the dispute at hand, and therefore inadmissible.

The counsel for the 1st defendant and 3rd party also objected to the plaintiff's attempt to call his proposed 2nd witness on the ground, *inter alia*, that the said proposed witness does not qualify as an expert within the provisions of s. 45-54 of the Evidence Act 1950.

The plaintiff's counsel conceded that the proposed 2nd witness is in no way connected with or involved in the transaction in question. The plaintiff's counsel submitted that the proposed 2nd witness's interpretation and construction of documents must be read in the light and taken in the context of the entire proposed witness statement. He further submitted that the proposed witness ought to be entitled to proffer her views in relation to specific clauses of the SPA, on the issue of what a prudent and reasonable lawyer will do in dealing with the same transaction.

This issue was argued by all the counsels just after PW1 has completed his evidence. The issue now is whether the proposed witness in question should be allowed to give evidence (based on her witness statement dated 8 April 2003) at the present trial and whether the said witness statement should be admitted as evidence. This grounds of judgment is only in respect of this issue, not on the plaintiff's claim *per se*.

The proposed witness in question is an advocate and solicitor of the High Court of Malaya. She is the sole proprietor of a legal firm. She has been practicing law for 18 years now. She is also a member of the Conveyancing Practice Committee which is formed by the Bar Council of Malaysia; also sits on the House Buyers' Claims Tribunal set up by the Ministry of Housing and Local Government. Apart from that, she is also a mediator under the Malaysian Mediation Centre.

The witness statement dated 8 April 2003 signed by the proposed witness contains 30 questions and answers. For better understanding of the issue at hand, I shall reproduce all the 30 questions below:

1. Q : Can you describe your current occupation?
2. Q : What are your professional qualifications?
3. Q : When were you admitted to the Bar?
4. Q : How long have you been the sole proprietor of Messrs R. Jaya & Associates?
5. Q : Where did you practice your law prior to that?
6. Q : Are you a member of any association or professional body related to the legal practice?

7. Q : How long have you been a member of the Conveyancing Practice Committee?

8. Q : In your 18 years of practice, which area of the law are you most experienced in?

9. Q : Can you tell us more about the extent of your conveyancing practice?

10. Q : What is the extent of the consideration in respect of the sales and purchases of the properties that you have undertaken?

11. Q : In the transactions that you have handled over the years in your practice, were undertakings and stakeholder arrangements involved?

12. Q : Why would that be so?

13. Q : What about loan transactions? Would loan transactions also encompass undertakings and stakeholder positions?

14. Q : Did you or you firms give undertakings in the transactions you have handled?

15. Q : Did you or your firm act as stakeholders in the transactions you have handled?

16. Q : Would you say you are very familiar with stakeholder arrangements and undertakings given in Conveyancing practice?

17. Q : Could I refer you to the sale and purchase agreements in question. Both agreements are dated 5 June 1996. The 1st agreement appears at p. 13 to 22 of the Bundle of Documents ("BoD"), Part A, and the 2nd agreement appears at p. 32 to 40 of BoD, Part A. Have you perused both agreements?

18. Q : Can I refer you to cl. 4 of the agreements. What is you understanding of cl. 4?

19. Q : Can I refer you to cl. 6 of the agreement. What is your understanding of cl. 6?

20. Q : If the vendor did not deposit the various documents forthwith upon execution of the agreements, would the undertaking still arise?

21. Q : Would your answer be different if some or all of the documents were not deposited by the vendor but by the purchaser or some third party?

22. Q : Why do you say this?

23. Q : In your experience, are clauses such as cls. 4 and 6 of the agreements normal or standard?

24. Q : In your experience, do vendors always deposit immediately with the purchaser's solicitors such document?

25. Q : Looking at cl. 6 of the agreements, who was the undertaking directed at?

26. Q : Could I refer you to para. 13 of the defence of the 2nd defendant. Could I also refer you to the letter date 12 June 1996 pleaded by the 2nd defendant, (see p. 456 BoD, Part C). In your opinion, is the 2nd defendant correct in the position that they are taking?

27. Q : Could I refer you to para. 14 of the defence of the 2nd defendant. In your opinion, is the 2nd defendant correct in the position that they are taking?

28. Q : Why do you have the opinion in respect of paras. 13 and 14 of the defence as aforesaid?

29. Q : In your opinion, what would the reasonable and prudent lawyer exercising the ordinary skill of a competent lawyer in the practice of conveyancing have done in the circumstances?

30. Q : How would the reasonable and prudent lawyer exercising the ordinary skill of a competent lawyer in the practice of conveyancing have ensured that position?

The said witness statement can be conveniently divided into (4) portions, namely:

i) her experience (Q 1-16);

ii) her interpretation of the clauses in the SPA (Q 17-25);

iii) her opinion on the documentary evidence before the court (Q 26-28);

iv) her opinion relating to the issue of negligence (Q 29-30).

Questions 1-16 and their answers attempt to highlight the occupation, professional qualification and experience of the proposed witness in legal practice. She is in no way connected with the transaction in question. Her evidence as to her qualification and experience is not relevant at this stage. Those evidence would only be allowed if the other portions of her witness statement are allowed.

Questions 17-25 and their answers clearly indicate that the proposed witness was doing her part in interpreting some of the clauses in the SPA which is the subject matter of the present suit. Again it must be emphasized here that the proposed witness is in no way involved in drafting or actually dealing with the said SPA.

She is trying to interpret and construe the contractual terms and conditions of the said SPA. In this context, I am in full agreement with the counsel for the 2nd defendant that the construction of clauses under a contract or an agreement is a matter purely and solely to be decided by the court assisted by counsels by way of submissions. It is a question of law. An opinion of law is not admissible. This principle was applied in *Pioneer Shipping Ltd & Ors v. BTP Tioxide Ltd* [1982] AC 724; [1981] 3 WLR 292; [1981] 2 All ER 1030, and was followed by Zakaria Yatim J in *Kassim bin Sulong & Anor v. Guthrie Estates Holdings Ltd & Ors* [1994] 3 CLJ 186.

In that case *(Kassim bin Sulong)* the court dealt with a letter written by Peat Marwick dated 15 June 1987 which was held to be an opinion of law. The court held:

> The above exhibits clearly state an opinion of law. Mr. Puthucheary rightly submitted that opinion of law was not admissible. I agree with him. It is the function of the Court to decide on questions of law.

On appeal to the Supreme Court *vide* Civil Appeal No. 01-242-90, the above decision was affirmed and the appeal was dismissed with costs.

In *Gleeson v. J. Wippell & Co. Ltd.* [1977] 1 WLR 510, Megarry VC said at p. 519 that "affidavits should not include a passage from an opinion of a Queen's Counsel or exhibit an article by a learned author as evidence of the legal rights or prospects of a litigant". The court further held that – "A court does not hear expert evidence on what the law of England is, or what the rights of parties are under the law. In any case, extract from counsel's opinion are usually valueless, or worse, without the rest of the opinion and the instructions on which it was based, to show what the opinion was founded on and what reservations and qualifications there are." The said decision was adopted by. Shankar J in *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386 when he held:

> What the law of Malaysia is or what the rights of parties are under the that law when the interpretation of the law, or the rights thereunder are disputed is a matter which has to be resolved by the Courts.

The interpretation or construction of a written agreement between parties is considered as a question of law. This was clearly stated by Lord Diplock in *Pioneer Shipping Ltd & Ors v. BTP Tioxide Ltd (supra)* as follows:

> Of course the dispute involves some question of law. It is difficult to conceive of a dispute under a charterparty that does not do so. The dispute is likely to be about what the parties have agreed shall be their respective legal rights and obligations in events that have actually happened or, it may occasionally be, in events that it is anticipated may happen. The answer must depend upon the true construction of the agreement between the parties; and in English jurisprudence, as a legacy of the system of trial by juries who might not all be literate, the construction of a written agreement, even between private parties, became classified as a question of law. The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they (or brokers acting on their behalf) chose to express them; or, perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed.

In the above cited cases, those were instances where evidence was attempted to be used by way of affidavit. However, I am of the view that there should not be any difference if the matter is being heard by way of *viva voce* evidence. Therefore those cited authorities must also be applicable to the present case where the proposed witness, who has tendered her witness statement, in the form of an affidavit, is also going to be called as a witness for the plaintiff during the trial.

Sarkar's Law of Evidence, 15th edn at p. 871 has clearly point out that:

> To put it briefly, a witness may not, on other than scientific subject be asked to state his opinion upon a questions of fact which is the very issue for the jury, as per instance, whether a drive is careful; a road dangerous; or an assault for homicide justifiable. Experts will not be allowed to give their opinions upon the construction of documents, for this, being a matter of law, is a question solely for the Court.

Base on the above authorities I am of the view that the questions and answers (no: 17-25) in the witness statement relate to a question of law ie, interpretation and construction of legal agreements and therefore not admissible. It is not necessary for the proposed witness to testify in court on those issues.

Questions and answers no: 26-30 of the witness statement clearly relate to matter of opinion by the proposed witness. As a general rule, an opinion is not an admissible evidence unless it is given by an expert under any of the provisions of ss. 45-51 of the Evidence Act 1950. Section 45 of the Act provides that an expert opinion may be relevant in matters pertaining to foreign law, science or art, identity or genuineness of handwriting or finger impression. Section 46 provides for relevancy of facts bearing upon opinion of experts. Section 47 talks about opinion as to handwriting or signature of a person. Section 48 provides for relevancy of opinion as to existence of right or custom. Section 49 provides for relevancy of opinion as to usages, tenet of any body of man; constitution and government of any religious or cheritable foundation; and meaning of words or terms used in particular districts or by particular classes of people. Finally, s. 50 relates to opinion on relationship of one person to another. In all those situations, the opinion of an expert is relevant and may be admissible.

The contents of the witness statement of the proposed witness in this case do not come under any of the above provisions of the Evidence Act 1950. The opinions of the proposed witness relate to the interpretation and construction of documentary evidence and issues of negligence. Opinions of expert in order to be admissible must confine to matters provided for under the relevant provisions of the Evidence Act 1950. It is based on the principle of "necessity" ie, when the court has to form an opinion upon a point of those matters. As has been said by Hashim Yeop Sani J in *Dato' Mokhtar Hashim v. PP* [1983] 2 MLJ 232:

> The opinion of witness possessing peculiar skill is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment without the assistance of an expert.

Again, in *Junaidi v. PP* [1993] 4 CLJ 201, the Supreme Court held that:

> In our view, the test to be applied for the purpose of section 45 of the Evidence Act 1950 is this: First, does the nature of the evidence require special skill?. Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry?.

Applying the above principle, the first point which must be satisfied before evidence of an expert opinion is to be admitted, is that the subject matter under enquiry or the nature of the evidence must be one which allows an expert to give his opinion as provided under the relevant provisions of the Evidence Act 1950. In the present case, the proposed witness attempts to give at the trial

relate to matters not provided under those relevant section, and therefore, not admissible. All those matters contained in the witness statement are matters to be decided by the court and not from the opinion of a third party, who is in no way connected with or involved in the transaction in dispute in this trial.

> An expert cannot usually be asked to express an opinion upon any of the issues, whether of law or fact, which the Court or jury have to determine. (see: *R v. Holmes* [1953] 2 All ER 324).

This principle has also been stressed in *Sarkar's Law of Evidence*, 15th edn 1999, at p. 883 in the following words:

> Clearly it is not the province of the expert to act as judge or jury. Hence all questions calling for his opinions should be so framed as not to call upon him to determine controverted questions of fact, or to pass upon the preponderance of testimony. Thus it would be obviously improper to ask the witness to state his opinion upon all the testimony in the case as to any given question, if the truth of part of such evidence were in dispute. When the question is so framed as to call upon the expert to determine on which side the evidence preponderates or to reconcile conflicting statements, he is in effect asked to decide the merits of the case which is duly wholly beyond his province.

Conclusion

For those reasons and guided by those considerations, it is my judgment that the proposed witness for the plaintiff, need not be called as a witness to testify based on her witness statement dated 8 April 2003 and the said witness statement is not to be admitted as evidence for the plaintiff.